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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

GABRIEL SALCEDO,

Defendant and Appellant.

C061879

(Super. Ct. No. 08F04811)

A jury found defendant Gabriel Salcedo guilty of four counts of assault with a deadly weapon (a car) with force likely to produce great bodily injury and found true allegations he committed the assault for the benefit of a criminal street gang.

On appeal, defendant contends the evidence was insufficient to sustain the Penal Code<sup>1</sup> section 186.22, subdivision (b)(1) gang enhancement allegations. We disagree and shall affirm.

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<sup>1</sup> Further unspecified statutory references are to the Penal Code.

## FACTS

The four victims in this case -- Angelina Ramirez, her young son Rubin Escoto, her daughter Susan, and Susan's boyfriend Michael Casanova -- drove one afternoon in May 2008 to the Circle K store in Rancho Cordova to buy snacks. Ramirez and Casanova went into the store; Ramirez's children remained in the car.

Inside the store, Casanova saw defendant and recognized him from high school; they did not speak nor did Casanova see or hear defendant say anything about him. Casanova believed from things he heard from friends in the past that defendant was a member of the Sureños gang.

After he was back inside Ramirez's car, Casanova saw defendant emerge from the store and walk toward some Hispanic men in nearby cars, who were staring and yelling in Casanova's direction. One man, whom Casanova knew as Edwin, was sitting in the passenger side of a gold car, yelling "South Side" or Sureño and "throwing up S signs." Casanova understood the sign as meaning Sureño, and he knew Edwin hung out with Sureños.

Ramirez noticed a green SUV in the parking lot, with a gold sedan parked behind it. She saw defendant sitting in the driver's seat of the SUV, and a "lot of Hispanics [were] in it," but Ramirez did not hear them say anything and did not see anyone make a gesture.

Ramirez drove east into a residential neighborhood. In a moment, she noticed the SUV speeding after her. The SUV passed and pulled in front of her, perpendicular to her car, blocking

her path. Defendant opened the driver's door of the SUV and got out, yelling "Get out of the car" or "[l]et's fight."

Ramirez started to back up, but then the gold sedan was behind her, blocking her from moving any further. The gold sedan then pulled nearly parallel to Ramirez: the driver reached out his window and struck the passenger window of Ramirez's car with a metal pipe several times. There were three or four Hispanic men in their late teens or early 20's in the sedan. Ramirez saw that they were speaking, but could not hear them because her windows were rolled up.

When Ramirez tried to maneuver around the SUV stopped in front of her, defendant twice rammed into the right front fender of her car to stop her. Then the gold sedan started "ramming" her car, too. Eventually, Ramirez was able to drive off. She returned to the Circle K market and dialed 911.

Ramirez's daughter Susan and Casanova identified defendant to police. Defendant was arrested and charged with four counts of assault with a deadly weapon, and it was alleged he committed the assault for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).)

The prosecution's theory at trial was that defendant and his cohorts -- members of a Sureño gang -- acted in concert to attack a suspected gang rival, Casanova.

When Casanova testified at trial, he denied gang membership. But defense counsel introduced photographs from his MySpace page, showing Casanova's nickname "L 14 L Savage," his use of the number 14, which he testified stands for "N," the

14th letter of the alphabet. One photograph of Casanova has "Norteno" written on it; a picture of a gun bears the legend "Norte for all eternity"; another emblem bears the words "[s]krap killa," a Norteno saying. Skrap is a derogatory term for Sureños; elsewhere on Casanova's MySpace page is written "[f]uck skraps."

Rancho Cordova Police Department Gang Investigator Burk Stearns testified he spoke with the victims, who identified defendant. Officer Stearns testified he knew defendant, whom law enforcement identified as a validated Sureño member, as he admitted in April 2007 being a Sureño gang member while in the company of two other admitted gang members. Officer Stearns also testified that, around the time of the crime, there existed gang tension (such as competing graffiti) between Nortes and Sureños in the location of the Circle K.

Detective Ronald Paul Aurich, who works in the "main jail intel gang unit," testified that defendant's assault "constituted a benefit to" the Sureño gang of which defendant is a member because it was an opportunistic gang assault upon a Norteno rival (Casanova), which yields Sureño gang members notoriety and respect within the gang culture.

The jury found defendant guilty of all charges and found the gang enhancement allegations true.

#### DISCUSSION

The jury found defendant committed the assaults for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1). That statute provides that

"any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished . . . ." (*Id.*, subd. (b)(1)(A)-(C).)

The section 186.22, subdivision (b)(1) enhancement requires the jury to find that the crime was committed for the benefit of a criminal street gang and with the specific intent to promote the criminal street gang.

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court

that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]" [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054; see also *People v. Augborne* (2002) 104 Cal.App.4th 362, 371; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1329 [applying the substantial evidence test to a contention that a § 186.22, subd. (b), gang enhancement was unsupported by the evidence].)

A gang expert's testimony alone is insufficient to find an offense gang related. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 931.) "[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the *crime* was committed for the benefit of, at the direction of, or in association with a criminal street gang." (*People v. Martinez* (2004) 116 Cal.App.4th 753, 762.)

Defendant contends Detective Aurich's testimony does not constitute substantial evidence to support the jury's true finding on the gang enhancements. He argues that, because the facts show defendant did nothing to announce or broadcast his gang affiliation -- he had no visible indicia of gang membership, neither threw up gang signs nor shouted out gang affiliation, and did nothing to identify himself to the occupants of Ramirez's car as a Sureño -- he could not have

committed the offense with the specific intent to benefit the gang.

Contrary to defendant's argument on appeal, it has been held that "specific intent to *benefit* the gang is not required. What is required is the 'specific intent to promote, further, or assist in any criminal conduct by gang members . . . .'"

(*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

There was substantial evidence from which the jury could conclude that defendant had the specific intent to promote, further, or assist in criminal conduct by members of the Sureños against a perceived Norteño, Casanova. While it is true that defendant neither threw gang signs nor announced his gang affiliation before or during the assault, he followed the car in which Casanova was riding for blocks, speeded so as to overtake it, trapped Ramirez between his SUV and the gold sedan so she could not escape efforts to break her car windows with a pipe, and then rammed Ramirez's car in concert with the driver of the gold car when she tried to maneuver her car away. Defendant and the driver of the gold sedan effectively sandwiched Ramirez's car and its passengers between them, to prevent her escape from the assault. In so doing, defendant (an admitted Sureño member) was acting in concert with men in the gold sedan -- at least one of whom had flashed gang signs and announced Sureño and/or South Side to the passengers in Ramirez's car. These events provided substantial evidence from which the jury could properly infer defendant was acting with the specific intent to assist his gang

compatriots in the gold sedan in assaulting and harassing Casanova and his friends.

For his argument to the contrary, defendant relies on three cases: *People v. Killebrew* (2002) 103 Cal.App.4th 644, *In re Frank S.* (2006) 141 Cal.App.4th 1192, and *People v. Ramon* (2009) 175 Cal.App.4th 843. These cases are distinguishable from the instant case.

In *Killebrew*, several gang members were traveling together in three cars, and a weapon was found in one of the cars; defendant was seen in the vicinity of the cars and the prosecution argued he had been in one of the vehicles earlier that evening. (*People v. Killebrew, supra*, 103 Cal.App.4th at p. 644.) Based on a gang expert's opinion that, when "one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun" (*id.* at p. 652), defendant was convicted of conspiracy to possess a handgun with a gang enhancement (*id.* at pp. 647, 658).

The court in *Killebrew* reversed the jury's finding on the gang enhancement, finding that the expert's testimony regarding the defendant's subjective knowledge and intent exceeded "the type of culture and habit testimony found in the reported cases." (*People v. Killebrew, supra*, 103 Cal.App.4th at pp. 644, 654, 658.) The expert improperly "testified to the subjective *knowledge and intent* of each occupant in each vehicle. Such testimony is much different from the *expectations* of gang members in general when confronted with a specific action." (*Id.* at p. 658.) The expert's testimony "did nothing



more than inform the jury how [the expert] believed the case should be decided. It was an improper opinion on the ultimate issue and should have been excluded." (*Ibid.*)

In *Ramon*, the defendant was a known gang member, arrested while driving a stolen vehicle in his gang's territory, in which a fellow gang member was riding. A loaded, unregistered firearm was under the driver's seat. Defendant was charged with receiving a stolen vehicle, possession of a firearm by an active gang member, and carrying a loaded firearm in public, with gang enhancements as to all counts. (*People v. Ramon, supra*, 175 Cal.App.4th at pp. 846-848.) The prosecution's gang expert testified one of the primary activities of defendant's gang was car theft, and defendant could have conducted numerous crimes, and spread fear and intimidation, by driving a stolen vehicle and having an unregistered firearm within his gang's territory. (*Id.* at pp. 847-848.) In response to a hypothetical question which mirrored the facts of the case, the expert concluded defendant's crimes would have benefited his gang. (*Id.* at p. 848.)

*Ramon* vacated the gang enhancements and found the gang expert's speculative testimony was the only evidence to support the inference that defendant committed the offenses with the specific intent to promote, further, or assist his gang's criminal conduct. "There were no facts from which the expert could discern whether [the defendant and his colleague] were acting on their own behalf the night they were arrested or

acting on behalf of [their gang]. While it is possible the two were acting for the benefit of the gang, a mere possibility is nothing more than speculation. Speculation is not substantial evidence. [Citation.]” (*People v. Ramon, supra*, 175 Cal.App.4th at pp. 846, 851.)

Finally, in *In re Frank S.*, the only evidence offered to support the gang enhancement allegation was that the defendant, a gang member, possessed a concealed dirk or dagger, and an expert witness speculated about his intent in doing so. (*In re Frank S., supra*, 141 Cal.App.4th at pp. 1195, 1199.) The appellate court found that gang membership alone does not prove a specific intent to use a knife to promote, further, or assist in criminal conduct by gang members. (*Id.* at p. 1199.)

Unlike the facts underlying *Killebrew, Ramon* and *Frank S.*, the expert’s opinion testimony here that defendant acted with an intent to benefit his gang was “coupled with other evidence from which the jury could reasonably infer the crime was gang related.” (*People v. Ferraez, supra*, 112 Cal.App.4th at p. 931.) The “other evidence” showed that defendant’s actions were coordinated in the assault on the victims with those in the gold sedan, at least one of whom had announced the group’s gang affiliation to Casanova with words and gestures. As we have explained above, this evidence of defendant’s actions provided

substantial evidence from which the jury could find the gang enhancements true.<sup>2</sup>

DISPOSITION

We affirm the judgment.

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ROBIE, J.

We concur:

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SIMS, Acting P. J.

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BUTZ, J.

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<sup>2</sup> The recent amendments to section 4019 do not operate to modify defendant's entitlement to credit, as he was required to register as a sex offender, committed for a serious or violent felony, and/or had a prior conviction(s) for a serious or violent felony. (§ 4019, subds. (b)(1), (2) & (c)(1), (2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.)